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## Consumer law in Constitution: a big mistake? The specific case of aviation in Brazil

### *Direito do consumidor na Constituição: um grande erro? O caso específico da aviação no Brasil*

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#### Abstract

Globalisation, alongside with the growth in trade and wealth has influenced the considerable development of consumer law over the last 50 years. In some countries, consumer rights have been embraced at the highest Constitutional level. For instance, in Brazil, consumer protection has been given a constitutional value. This constitutional value has been reinforced by the approach taken by the Federal Supreme Court of Brazil with regard to that nation's Consumer Code (CDC). In spite of the existence of a specific federal agency with its own rules to govern civil aviation, the services rendered by airline companies are also subject to the Consumer Code. For an obscure reason, and even though logic would favor application of the Montreal Convention, Brazilian judges prefer to apply the Brazilian Consumer Code to international air service, in cases involving consumers. The conflict between the Montreal Convention and the CDC is limited to one area, which is one of the most important areas regulated by the Convention, namely the civil

#### Resumo

A globalização, ao lado do crescimento do comércio e da riqueza, influenciou o considerável desenvolvimento do Direito do Consumidor durante os últimos 50 anos. Em alguns países, o Direito do Consumidor é regulado em nível constitucional. Por exemplo, no Brasil, a proteção do consumidor foi determinada como um valor constitucional. Este valor constitucional foi reforçado pela abordagem levada pelo Supremo Tribunal Federal do Brasil em relação ao Código de Proteção e Defesa do Consumidor (CDC) daquela nação. Apesar da existência de uma agência federal específica com suas próprias regras, os serviços feitos por companhias de linha aérea estão também sujeitos ao Código de Defesa do Consumidor, apesar da existência de uma agência federal específica com suas próprias regras. Por uma razão obscura, e embora a lógica favorecesse a aplicação da Convenção de Montreal, os juízes brasileiros preferem aplicar o CDC ao serviço aéreo internacional, em casos que envolvem os consumidores. O conflito entre a Convenção de Montreal e o CDC é limitado a uma área que é um das mais importantes

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responsibility of the carrier. This paper demonstrates that the inclusion of consumer rights as constitutional rights does not improve the standard of consumer protection but instead put a heavy burden on airlines and in the case of the CDC even creates legal uncertainty.

**Key-words:** Aviation; CDC; consumer rights; fundamental rights; Constitution.

*entre aquelas reguladas pela Convenção: a responsabilidade civil do portador. Este artigo demonstra que a inclusão de direitos de consumidor como direitos constitucionais não melhora o padrão de proteção de consumidor, mas, ao revés, põe um fardo pesado em linhas aéreas e no caso do CDC cria até mesmo insegurança jurídica.*

**Palavras-chave:** Aviação; CDC; direito do consumidor; direitos fundamentais; Constituição.

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## 1. INTRODUCTION

Globalisation, alongside with the growth in trade and wealth has influenced the considerable development of consumer law over the last 50 years. As a result, numerous regulations have been adopted to ensure a fair balance between professional suppliers and individuals. In some countries, consumer rights have been embraced at the highest Constitutional level. For instance, in Brazil, consumer protection has been given a constitutional value. This constitutional value has been reinforced by the approach taken by the Federal Supreme Court of Brazil with regard to that nation's Consumer Code (CDC).<sup>1</sup>

Brazil is not the only country having done so. Indeed, awareness of consumer rights as basic rights started with a message to the US Congress by the then President John F. Kennedy in March 1962.<sup>2</sup> President John F. Kennedy outlined four fundamental consumer rights.<sup>3</sup> Although this declaration had no impact on the US Constitution and had no specific value, this speech had some repercussion elsewhere. This speech contributed to the emergence of new social and legal phenomena. Currently, consumer protection is ensured by some provisions in 47 countries, the majority of which are developing countries or had their constitution drafted in time of economic harshness.<sup>4</sup>

<sup>1</sup> Código de Proteção e Defesa do Consumidor. Lei nº 8.078 de 11 de Setembro de 1990

<sup>2</sup> Public Papers of the United States. J. F. Kennedy – Public Messages, Speeches and Statements of the President, 1.1.– 31.12. pp. 235–240, United States. Office of the Federal Register. U.S. Govt. Print. Off., 1962; KINGISEPP, Margus. The Constitutional Approach to Basic Consumer Rights. *Juridica International Law Review*, Ülikooli, vol. 19, p. 49-58, 2012. p. 49.

<sup>3</sup> Public Papers of the United States. J. F. Kennedy, Op. Cite 2.

<sup>4</sup> ELKINS, Zachary; GINSBURG, Tom.; MELTON. Characteristics of National Constitutions, Version 2.0. Comparative Constitutions Project, 2014. Available at: < <https://www.constituteproject.org/search?lang=en&key=conright>>.

The European Union has a somewhat different approach to consumer protection. Indeed, since the Single European Act, the Union guarantee a high level of consumer protection, as embodied in the Charter of Fundamental Rights and the European treaties. Additionally, Article 12 of the Treaty on the Functioning of the European Union (TFEU) only sets as a general objective that “Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.” Therefore, although there are references in the ‘constitution’ of the European Union, the references are so vague that a large room of maneuver is left to the Union institutions and the Member States.<sup>5</sup>

Although embodied in several constitutions, the discussion of the substantive meaning of consumer protection as a new type of fundamental rights has rather been modest. The main purpose of this paper is to assess whether the inclusion of extensive provisions on consumer protection, such as in Brazil, has a negative impact, especially on aviation. To answer the main question, the extent to which consumer protection is recognized as fundamental rights at international and national level will be explored. In the case of aviation, it will be demonstrated that the inclusion of consumer rights as Constitutional rights does not improve the standard of consumer protection but instead put a heavy burden on airlines and in the case of the CDC even creates legal uncertainty. The legal uncertainty that the CDC creates for foreign airlines has led to an increase in flight tickets and the closure of some routes that were not considered lucrative enough. The approach taken by the Federal Supreme Court is dangerous on another level as it does not respect the principle of reciprocity and disregards the international obligations contained in treaties. Although in every constitution contains enumerated and unenumerated rights, a major constitutional issue is linked to the question of whether courts have authority to enforce rights that are not actually directly granted by the Constitution itself.<sup>6</sup> A subquestion is whether, even though the right has been enumerated in a very broad abstract way, courts may give prevalence over international treaties. In the case of aviation in Brazil, the declaration of basic consumer rights as Constitutional rights is more associated with changes for the worse.

## 2. CONSUMER LAW AS UNIVERSAL HUMAN RIGHT: A UTOPIA?

“To counterbalance market inequalities, there have been continuous attempts to create global ethical values through a declaration of fundamental consumer rights.”<sup>7</sup>

<sup>5</sup> The Treaty of the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) are never referred to as the constitution of the European Union. However in practice, the Treaties fulfill the same role as a constitution.

<sup>6</sup> DWORKIN, Ronald. Unenumerated Rights: Whether and How Roe Should be Overruled. *University of Chicago Law Review*, Chicago, vol. 81, p. 381- 432, 1992. p. 381.

<sup>7</sup> KINGISEPP, Margus. The Constitutional Approach to Basic Consumer Rights. *Juridica International Law Review*, Ülikooli, vol. 19, p. 49-58, 2012. p. 50.

Human rights as a concept traditionally refer to the notion human beings that possess universal rights. These rights are commonly regarded as 'inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being.'<sup>8</sup> In other words, human rights are universal rights flowing from the simple fact that a person is a human being. Some authors advocate the idea that consumer is a basic human condition and therefore basic consumer rights should be recognised.<sup>9</sup>

Deutch has tried to demonstrate that consumer rights possess the three main characteristics of human rights and that they had the potential to become soft human rights.<sup>10</sup> Those characteristics are: first, there is a universal acceptance of consumer rights as there is increasing international recognition of consumer rights in international treaties. Second, consumer rights to fair trade, safe products, and access to justice are granted to maintain human dignity and well-being, notwithstanding the economic market impact. Third, consumer rights are similar to other accepted human rights in that they are intended to protect individuals from arbitrary infringements by governments. This last characteristic is problematic as consumer rights inevitably require governmental intervention and are directed against companies, not governments.<sup>11</sup> Although in Brazil some have tried to use the Consumer Code (CDC) to complain about taxation issues, no courts have ever accepted to apply the CDC to taxation matters. In a consumer relationship, governments are not involved, except to remedy market failures, as it is a private relationship between a consumer and a seller.<sup>12</sup>

It is true that a number of aspects of consumer activities are falling within human rights protection. For instance, product liability guarantees that human health and physical integrity, which is part of the broader fundamental right to life, is respected.<sup>13</sup> However, in most of the case consumer law is only indirectly connected to human right issues, such as discrimination or child labour. To push the boundaries of human rights is a risky move as at the end every human activity can be indirectly linked to a human right issue.

Since nearly all human activities can be indirectly linked to human right issues, a distinctive feature of human rights, that is widely accepted, has been added. Such rights should satisfy fundamental interests and needs, which if violate or neglect could

<sup>8</sup> SEPULVEDA M. et al. **Human Rights Reference Handbook**. Costa Rica: University for Peace, 2004, p. 3.

<sup>9</sup> DEUTCH, Sinai. Are consumer rights human rights? **Osgood Hall Law Journal**, North York, vol. 32, n. 3, p. 537-578, oct./dec. 1994. p. 551-552.

<sup>10</sup> DEUTCH, Sinai. Are consumer rights human rights? **Osgood Hall Law Journal**, North York, vol. 32, n. 3, p. 537-578, oct./dec. 1994. p. 551-552.

<sup>11</sup> BENOHR, I.; MICKLITZ, Hans. Consumer protection and human rights. In: HOWELLS, I.; RAMSAY, T. (Ed.). **Handbook of Research on International Consumer Law**. Cheltenham: Edward Elgar Publishing, 2010. p. 25.

<sup>12</sup> For a deeper discussion about market failures, see BOURGOIGNIE, T. **Foundations, features and instruments of European Union consumer law and policy**. Louvain: Université Catholique de Louvain, 1996. p. 3-4.

<sup>13</sup> HARDING, C.; KOHL, U.; SALMON, N. **Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors**. Aldershot: Ashgate, 2008. p. 69.

cause death or dire suffering. Violation of consumer rights rarely creates such tragic consequences. Human rights are also often abstract, while consumer rights are laid down in legislations that are relatively clear-cut.

Consumer is not a new concept, since the starting of civilisation there has been trading and therefore suppliers and buyers. Even though globalisation has changed some of the realities, at the time of the first human right declarations, no one deemed fit to include such rights. The changes have not been so radical to explain this sudden need of considering consumer protection as a fundamental right. By considering consumer protection as a fundamental right, the legislators overprotect consumers and creates a disequilibrium in the market. Legislators start to interfere in the market making harder for companies to compete or even survive.

Even in the UN International Covenant on Economic, Social and Cultural Rights, which forms part of the International Bill of Human Rights, Article 11 (1) only refers to the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions.<sup>14</sup> These goals indirectly refer to consumer protection. However, even the UN has refused to include consumer protection as fundamental rights. Therefore, consumer right protection as a universal fundamental right is a utopia.

### 3. RECOGNITION OF CONSUMER RIGHTS AS FUNDAMENTAL RIGHTS AT INTERNATIONAL AND NATIONAL LEVEL

At international level, no hard law has been enacted. However, some guidelines, which provide a set of basic consumer protection, has been introduced and embodied in the 1985 UN Guidelines for Consumer Protection.<sup>15</sup> Eight fundamental consumer rights are listed which include protection of basic needs, the right to be informed, to safety, to choice, to redress, to consumer education, to a healthy and sustainable environment and finally the right to be heard. The right to sustainable consumption was added in 1999.

The guidelines provide a policy framework for implementation of national law, as the government has agreed. Even though the rights embodied are not mandatory, the guidelines have significantly influenced international legal thinking.

At EU level, consumer protection as fundamental rights is an exception. Indeed, neither the Convention for the Protection of Human Rights and Fundamental Freedoms nor the European Social Charter mentions consumer rights explicitly.<sup>16</sup> Only Article 11

<sup>14</sup> UNITED NATIONS. **International Covenant on Economic, Social and Cultural Rights**. Available at <<http://www2.ohchr.org/english/law/cescr.htm>>.

<sup>15</sup> UNITED NATIONS. **Guidelines for Consumer Protection** (as expanded in 1999). New York: United Nations, 2003.

<sup>16</sup> Council of Europe. **Convention for the Protection of Human Rights and Fundamental Freedoms** (as amended by protocols 11 and 14). Available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (most recently ac-



of European Social Charter indirectly refers to consumer right by referring to the right of health protection. In the Charter of Fundamental Rights names, among other rights, consumer rights, especially Article 38. Some even try to rely on Article 6 of the European Convention on Human Rights, the right to life, to argue that consumer protection should have a fundamental right value.<sup>17</sup>

The only reference in the EU treaties can be found in Article 2 of the Treaty on the European Union (TEU) as an indirect reference and directly in Article 12 TFEU. The European Council issued in 1975 a special program for consumer protection and information policy and then various other successors.<sup>18</sup> All these documents have served as a basis for the growing corpus of directives and regulations in the area of consumer protection. For instance, the right to protection of health and safety is clearly regulated in the General Product Safety Directive.<sup>19</sup> The right to claim damages is addressed mainly by the Product Liability Directive.<sup>20</sup> Various directives are aimed at the protection of consumers against unfair commercial practices and unfair contract terms.

#### 4. CONSTITUTIONAL RIGHTS: EUROPEAN AND BRAZILIAN APPROACH

A constitution is the backbone of any modern legal system. Under Kelsen's theory, an act gains its normative meaning from a higher legal norm. At some point, a norm has not been authorized by any other legal norm but is presupposed to be legally valid. Kelsen called the normative content of this presupposition the basic norm. The constitution is always the basic norm.<sup>21</sup>

The exercise of a State's power is based on a legal infrastructure, which is anchored in a constitution that guarantees minimum rights to the population.<sup>22</sup> These rights are preserved by institutional mechanisms based on the concept of the Rule of Law. Constitutional right must be based on a valid Constitutional norm that grants such

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cessed on 28.5.2012); Council of Europe. European Social Charter (as revised in 1996). Available at [http://www.coe.int/t/dghl/monitoring/socialcharter/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/socialcharter/default_en.asp) (most recently accessed on 28.5.2012).

<sup>17</sup> KINGISEPP, Margus. The Constitutional Approach to Basic Consumer Rights. *Juridica International Law Review*, Ülikooli, vol. 19, p. 49-58, 2012. p. 51 MENENDEZ, A. J. Some elements of a theory of European fundamental rights. In: MENENDEZ, A. J.; ERIKSEN E. O. *Arguing Fundamental Rights*. New York: Springer, 2006. p. 163.

<sup>18</sup> Council Resolution of 14.4.1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy. – OJ C-092, 25.4.1975.

<sup>19</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3.12.2001 on general product safety. – OJ L 11, 15.1.2002, p. 417.

<sup>20</sup> Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. – OJ L 210, 7.8.1985

<sup>21</sup> KELSEN, H. *General Theory of Law and State*. Cambridge: Harvard University Press, 1945; KELSEN, H. *Introduction to the Problems of Legal Theory*. Wotton-under-Edge: Clarendon Press, 2002.

<sup>22</sup> Not all modern societies have a Constitution to limit the sovereign's power. For example, in the U.K. the Parliament is seen as the sovereign, having the power to change any rules that exist in its political system. See DICEY, A. V. *The Law of the Constitution*. Oxford: Oxford University Press, 2013.



right. "Only norms according to which Constitutional rights are granted are taken to be Constitutional-rights norms."<sup>23</sup> Any discussion on fundamental rights presupposes a distinction between Constitutional and non-fundamental rights, referring to the hierarchy of norms lying at the very root of any legal system. When a right receives a constitutional value, it is hard to change it.

#### 4.1. The European approach

A constitutional comparison of the law of the various Member States reveals very divergent approaches to consumer rights and their incorporation in the states systems. These differences are often the result of the approaches taken toward welfare systems embodied in the constitutions. The approaches to welfare systems are often linked to fundamental right recognition and determine the recognition of consumer protection as a fundamental right or not.<sup>24</sup>

Three models can be distinguished within the European context: the protective model, the moderate model and the liberal model. The protective model is characterized by the inclusion within the constitution of extensive fundamental social rights. Often the provisions embodying these rights are instructions to the state when enacting further measures to enable citizens to exercise the rights concerned.<sup>25</sup> The moderate model combines a liberal approach with the definition of rights. Often this system includes policy clauses to oblige governments to stimulate the labour market. Finally, in the liberal model, social rights are not included in the constitutions.

In most European Member States, consumer rights are fixed in ordinary legislation, following either the moderate model or the liberal model.<sup>26</sup> Most Member States, such as Germany, Finland, Great Britain, Sweden, and Estonia, do not have provisions on consumer rights in their constitutions and are far from awarding consumer rights the status of fundamental rights. For instance, the UK and Austria have a liberal model. Indeed, both countries follow a very liberal attitude toward economy which is difficultly reconcilable with the adoption of specific social rights. Especially in the UK were no formal constitution was enacted. It was clear for the legislators of these two countries that fundamental social rights did not need to be enshrined in a constitution for the state to assure basic social services. The moderate model is applied in Germany and France. Social rights are protected through a welfare state clause in the German Basic Law, which

<sup>23</sup> KINGISEPP, Margus. The Constitutional Approach to Basic Consumer Rights. *Juridica International Law Review*, Ülikooli, vol. 19, p. 49-58, 2012. p. 52; ALEXY, R. *A Theory of Constitutional Rights*. Oxford University Press, 2004, p. 19.

<sup>24</sup> BUTT, M.; KUEBERT J.; SCHULTZ C. *Fundamental Social Rights in Europe*. Luxembourg: European Parliament, 1999. Available at: <[http://www.europarl.europa.eu/workingpapers/soci/pdf/104\\_en.pdf](http://www.europarl.europa.eu/workingpapers/soci/pdf/104_en.pdf)>.

<sup>25</sup> BUTT, M.; KUEBERT J.; SCHULTZ C. *Fundamental Social Rights in Europe*. Luxembourg: European Parliament, 1999. Available at: <[http://www.europarl.europa.eu/workingpapers/soci/pdf/104\\_en.pdf](http://www.europarl.europa.eu/workingpapers/soci/pdf/104_en.pdf)>. p. 33.

<sup>26</sup> BRUGGEMEIER, G. et al. *Fundamental Rights and Private Law in the European Union I – a Comparative Overview*. Cambridge: Cambridge University Press 2010. p. 651–652.

must be respected in any action that the public authorities are taking. In none of the constitutions of these two countries, consumer protection is specifically mentioned.

Other Member States, mostly Mediterranean countries which are famous for their strong social rights influence, such as Spain, Italy and Portugal but also Eastern European countries, have incorporated fundamental or basic consumer rights in their national constitution. The Constitutional courts of these countries have also been proactive in maintaining a comprehensive protection of their citizens, through the careful reading of the consumer rights provisions.

The Constitution of the Portuguese Republic of 1976 acknowledges consumer rights in its Article 60 (1).<sup>27</sup> Even though consumer rights are embodied in Article 60(1), the Article only refers to the right to good quality of the goods and services consumed, to training and information but also the protection of health, safety, and their economic interests and finally to reparations for damages.<sup>28</sup> Consumers also have an institutional guarantee, embodied in Article 60(3), of procedural rights. Consumer protection was elevated to basic rights through this constitutional provision. This provision was the basis for the Consumer Protection Law of Portugal of 1981.

According to Article 51 (1) of the Constitution of Spain of 1978, the public authorities is obliged to guarantee the protection of consumers and must take effective measures to safeguard their safety, health and legitimate economic interests.<sup>29</sup> The second paragraph of the same Article stipulates that “the public authorities shall promote the information and education of consumers and users, foster their organization, and hear them on those matters affecting their members (...)”

Although it has constitutional value, the provision only indicates the principles that the state should bear in mind while enacting policies but does not provide rights for individuals.<sup>30</sup> The article provides for basic consumer rights, such as information, education and health, which was the basis for the Law for the Defence of Consumers and Users of 1984.

Various Central and Eastern European countries, especially the ones influenced by German law, such as Poland or Hungary, social rights were inserted in the new constitutions but still followed the principle of the social market economy, making it difficult to classify the country between moderate liberal than protective. Poland also

<sup>27</sup> HOWELLS, Geraint G.; RAMSAY, I.; WIELHMSSON Thomas. **Handbook of Research on International Consumer Law**. Cheltenham: Edward Elgar Publishing, 2010. p. 37.

<sup>28</sup> Constitution of the Portuguese Republic, seventh revision (2005). Available at <<http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>>.

<sup>29</sup> The article states that: “The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests”.

<sup>30</sup> SCHULTE-NOLKE H.; TWIGG-FLESNER C.; EBERS C. **EC Consumer Law Compendium – the Consumer Acquis and Its Transposition in the Member States**. Munich: Sellier European Law Publishers, 2008. p. 70; FERRERES-COMELLA, A.; AYO-FERRANDIZ, Spain. Consumers protection/product liability legal framework in Spain. **Mondaq**, nov. 2003. Available at <<http://www.mondaq.com/article.asp?articleid=23461>>.

has framework provisions indicating the principles of state policy in Article 76 of the Polish Constitution. The Polish Constitutional Court has had the opportunity to test the compliance of Polish law with the principles of consumer protection.<sup>31</sup> However, according to Letowska, judges are still reluctant to apply the new consumer provision added in the Polish Constitution. The Lithuanian Constitution has a similar provision, Article 46, which states that “[...] The State shall defend the interest of consumer”.<sup>32</sup> Central and Eastern European countries had no tradition of consumer protection and therefore most of the provisions enacted in these constitutions are, at least partially, based on European law. Constitutional courts in Central Europe are giving a strong importance to the role of human rights.<sup>33</sup> Surprisingly, even in the newer constitutions, no catalogue of subjective consumer rights was provided. Such catalogue remains the peculiarity of the Portuguese Constitution.

Even with specific provisions elevating social rights to the level of basic rights, Portugal is bound to implement and apply European law and international law. Portugal protects consumers in a similar manner as Brazil. However, there are no instances of Portugal setting aside European or international law on the basis of their Constitution. Indeed, the Portuguese Constitution contains a provision giving prevalence to international and European law.<sup>34</sup>

## 4.2. The Brazilian approach

Brazil follows the protective model as the Brazilian Constitution enshrines various consumer rights provisions. The Federal Constitution of Brazil was adopted by the National Constituent Assembly in 1988. In fact, the National Congress stopped functioning as a legislative body and dedicated itself for nearly a year to the writing of the Brazilian Federal Constitution. The 1988 Federal Constitution is a complex document, full of self-executing dispositions. It did not follow the path of previous constitutions. Indeed, some articles, sections, and subsections were removed and some were added.

The Brazilian Constitution formally protects a vast array of fundamental human rights. As Keith S. Rosenn put it, Article 5, alone, ‘impressively appears to protect virtually every form of known human right.’<sup>35</sup> The concept of human rights is probably the

<sup>31</sup> LETOWSKA, E. The Constitutional aspect of consumer protection in Poland. In : REICH N.; THEVENOZ, L. **Droit de la consommation – Konsumentenrecht – Consumer law**. Zurich: Liber amicorum Bernd Stauder, 2006. p. 227 et seq.

<sup>32</sup> The full article is: “Lithuania’s economy shall be based on the right of private ownership, freedom of individual economic activity and initiative. The State shall support economic efforts and initiative that are useful to society. The State shall regulate economic activity so that it serves the general welfare of the Nation. The law shall prohibit monopolisation of production and the market and shall protect freedom of fair competition. The State shall defend the interest of consumer”

<sup>33</sup> SADURSKI, Wojciech. **Solange, chapter 3: Constitutional Courts in Central Europe- Democracy- European Union**. Firenze: European University Institute, 2006.

<sup>34</sup> Made clear in the Case C- 348/89, Mecanarte [1991] I - 3299

<sup>35</sup> ROSENN, K. S. Brazil’s New Constitution: An Exercise in Transient Constitutionalism for a Transitional Society. **American Journal of Comparative Law**, Oxford, vol. 38 , n. 4, 1990. p. 778.

most thoroughly protected in the Brazilian Constitution than in the legislation of any other country in the world.<sup>36</sup> This can be deduced from the wording of the preamble of the Constitution which explicitly states that its main objective is to “institute a democratic state for the purpose of ensuring the exercise of social and individual rights, liberty, security, well-being, development, equality and justice as supreme values of a fraternal, pluralist and unprejudiced society, founded on social harmony and committed, in the internal and international orders, to the peaceful settlement of disputes”.

Undoubtedly, Article 5 is the most impressive article on the protection of fundamental rights. On top of the long list of fundamental rights that are enumerated, a clause within Article 5 adds that rights explicitly mentioned do not preclude others derived from the ideal of ‘democratic state under the rule of law’ (*Estado Democrático de Direito*), or from any international conventions entered into by the government.

Article 5 of the Constitution is the most important, for the topic at hand. Article 5(1) (V) and (X) are the basis of the CDC. Article 5 (1) (V) states that: “All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (CA No. 45, 2004) [...] V – the right of reply is ensured, in proportion to the offense, as well as compensation for property or moral damages or for damages to the image;”. Article 5 (1) (X) continues “X – the privacy, private life, honour and image of persons are inviolable, and the right to compensation for property or moral damages resulting from their violation is ensured.”

The Brazilian legislator wanted to make sure to explicitly forbid any amendment to the Constitution aimed at abolishing, among other things, the individual rights and guarantees of the citizen that are explicitly or implicitly mentioned in the constitutional text, a stone clause was added in Article 60. Therefore, fundamental rights in Brazil are extremely well protected and consumer rights are strongly embodied in the Constitution.

To be able to later discuss the problem of the CDC, the place of international treaties in the Brazilian legal system must be analysed.

## 5. INTERNATIONAL TREATIES IN THE BRAZILIAN SYSTEM

Similarly to all countries<sup>37</sup>, the Brazilian Constitution is superior to all other laws, including international treaties, as made clear by the Federal Supreme Court in *Da Silva Couto v. Iberia-Lineas Aereas de Espana S/A*.<sup>38</sup>

<sup>36</sup> ROSENN, K. S. Judicial Review in Brazil: Developments under the 1988 Constitution. *Southwestern Journal of Law and Trade in the Americas*, Los Angeles, vol. 7, 2000, p. 315.

<sup>37</sup> See for instance: BRICKER, J. W; WEBB, C. Treaty Law vs. Domestic Constitutional Law. *Notre Dame Law Review*, Notre Dame, vol. 29, n. 4, p. 529-550, aug. 1954.

<sup>38</sup> RE no. 172720-RJ, Feb. 6, 1996, R.T.J. 162-03/1093. “The fact that the Warsaw Convention contains rules limiting the com-

Article 4 of the Brazilian Constitution governs Brazil's international relations under the following ten principles:

- I – national independence;*
- II – prevalence of human rights;*
- III – self-determination of the peoples;*
- IV – non-intervention;*
- V – equality among the states;*
- VI – defense of peace;*
- VII – peaceful settlement of conflicts;*
- VIII – repudiation of terrorism and racism;*
- IX – cooperation among peoples for the progress of mankind;*
- X – granting of political asylum.*

Article 4 further states: “the Federative Republic of Brazil shall seek economic, political, social, and cultural integration of the peoples of Latin America, in order to form a Latin-American community of nations.” However, nowhere in the Constitution is the place of international law as a source of domestic law discussed. This omission was criticized by various authors as a missed opportunity by Brazilian legislators to choose between one of the two theories and create legal certainty with regard to international norms.<sup>39</sup> This omission is also having heavy repercussions in the aviation field, as the most important international treaties on the matters are regarded as ordinary laws.

Article 5(2) stipulates that “the rights and guarantees established in this Constitution do not preclude others arising out of the regime and principles adopted by it, or out of international treaties to which the Federative Republic of Brazil is a party.” However, at the same time, Article 102 requires the Federal Supreme Court to safeguard the Constitution and the obligations provided by it. Specifically, Article 102 III (b) grants the Federal Supreme Court, on extraordinary appeal, the power to “declare[ ] the unconstitutionality of a treaty or a federal law.” The Federal Supreme Court, under Article 105 III (a), can judge, on special appeal, a decision that is contrary to a treaty or federal law, or which denies the effectiveness of such instruments. The power of federal judges is further extended with respect to international treaties in Article 109 III. Under this Article, federal judges have the competence to institute legal proceedings in “cases

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pensation of material damages does not exclude the possibility to grant moral damages. This possibility is amplified by the discomfort, embarrassment, boredom, and humiliation suffered by a passenger whose suitcase has been lost. For this reason, and following the observation made by the Political Letter of the Republic, Articles 5 V and X override treaties and conventions ratified by Brazil” RE No. 172720-9-RJ, Min. Marco Aurélio, DJ, 21.02.1997.

<sup>39</sup> BASTOS, Celso; MARTINS, Ives Gandra. **Comentários à Constituição do Brasil**. v. 1. 3. ed. São Paulo: Saraiva, 2004. p. 452.

based on a treaty or a contract of the Republic with a foreign State or international organization.”

Although the position of international treaties seems clear, in the area of aviation, the conflict between the *Código de Proteção e Defesa do Consumidor* (CDC) and the Montreal Convention has not yet been settled.

## 6. THE SPECIFIC CASE OF THE *CODIGO DE PROTEÇÃO E DEFESA DO CONSUMIDOR* (CDC) IN AVIATION AND THE ROLE OF THE BRAZILIAN COURTS

Article 2 of the CDC defines a consumer as a legal or physical person that uses the product or service as an end consumer.<sup>40</sup> However, the article allowing the Brazilian courts to rely on the CDC is Article 3. This article refers to the service provider, which can be either a national or a foreigner. “Service” is defined in Article 3(2) in such broad terms that any type of service would fall within its definition.

With regard to international transportation, a specific article was added to the Constitution. Indeed, Article 178(1) states that “[t]he law shall provide for the regulation of air, water and ground transportation, and it shall, in respect to the regulation of international transportation, comply with the agreements entered into by the Union, with due regard to the principle of reciprocity.” Brazil has ratified both the Warsaw and the Montreal Conventions, which apply to liability cases involving international transportation by air. The Warsaw Convention established a fault-based system of responsibility and a limitation of liability for air carriers. The Montreal Convention of 1999 modernized the Warsaw system and consolidated it into a single document while retaining the limitation of liability. In Brazil, the liability of air carriers for damages was regulated by the Civil Code in conjunction with Article 84 do *Decreto no. 16.983, 1925*. Then the *Código Brasileiro do Ar* de 1938 (*Decreto-Lei no. 483, de 08.06.1938*) was enacted but later replaced by the *Novo Código Brasileiro do Ar* de 1967 (*Decreto-Lei no. 32, de 18.11.1966*). The Warsaw Convention was transposed in the *Código Brasileiro de Aeronáutica* de 1986 (*Lei no. 7.565, de 19.12.1986*). However, none of these laws provide an answer for delayed flights, canceled flights, or denied boarding. Consequently, the approach taken by Brazilian courts to raise the Brazilian Consumer Code to the level of a superior law is, therefore, contrary to the requirement of this Article.<sup>41</sup> Furthermore, such an approach violates the principle of reciprocity.

<sup>40</sup> Passengers are within the definition as made clear in two 2009 cases: *Silva v. C.A. Viagens Ltda.*, T.J.S.C., Ap. Civ. No. 2008.024456-5, Relator: Des. Fernando Carioni, 25.11.2008, and *América Latina Companhia de Seguros v. Deutsche Lufthansa AG*, STJ–AgRg No. REsp 262687/SP no. 2000/0057696-4, Relator: Exmo. Sr. Min. Fernando Gonçalves, 15.12.2009.

<sup>41</sup> The argument of Air France in Extraordinary Appeal (Recurso Extraordinário) No. 636331 was heavily based on conflict.

When the Brazilian Constitution was enacted, it provided in its Article 5 V and X for moral damages, little did we know that this provision would be so widely used. The *Código de Proteção e Defesa do Consumidor* (Consumer Code, or CDC) is based on Article 5 of the Constitution. Despite the existence of federal laws and a specific federal agency (ANAC) with its own rules to govern civil aviation, the services rendered by airline companies are subject to the Consumer Code. For an obscure reason, and even though logic would favor application of the Montreal Convention, Brazilian judges prefer to apply the Brazilian Consumer Code to international air service, in cases involving consumers. The main argument to apply the CDC instead of the Conventions is based on the fact that the obligation to fully compensate, as introduced in Article 6 VI, is a basic right of consumers. Therefore, the limitation of liability cuts directly against this principle and should be disappplied in cases involving consumers.

The conflict between the Montreal Convention and the CDC is limited to the civil responsibility of the carrier, which is one of the most important areas regulated by the Convention. No apparent conflict of norms between the two regimes exists when no consumer relationship is involved, as the CDC will not shelter typical commercial relationships. The conflict of norms is evident when analyzing cases dealing with delay, cancellation, luggage loss, etc.<sup>42</sup>

The Consumer Code brought important modifications to the Brazilian legal order. The Warsaw system was already incompatible with Brazilian law,<sup>43</sup> but this incompatibility was nothing compared to the changes brought by the Code. Indeed, the Code established the principles of integral refund and objective responsibility. These two principles are rooted in the Brazilian Constitution,<sup>44</sup> as are principles of economic order.<sup>45</sup> The Code is considered the exclusive law applicable to consumers' cases. A decision of the Federal Supreme Court attests to such an approach with regard to airline tickets.<sup>46</sup> The same holds true for lost luggage, which entitles the owner of the luggage to a minimum compensation of R\$ 4.000 which respects the 1000 SDRs of Article 19 of the Montreal Convention.<sup>47</sup> As a result, the compensation offered by Brazilian courts

<sup>42</sup> In a report from the secretariat for consumers of the Ministry of Justice, it was not excluded that the CDC would apply in accidents as well. See Ministério da Justiça Secretaria Nacional do Consumidor Gabinete da Secretária, Ofício Circular N. 5762-2012/Senacôn/MJ, Sept. 2012.

<sup>43</sup> The liability was much higher in the Warsaw Convention than in the Code. Under the Brazilian Code of Air, the damages are calculated in Obrigações do Tesouro Nacional, not in SDR. NORONHA, Fernando. A Responsabilidade Civil do Transportador Aéreo por Dano a Pessoas, Bagagens e Cargas. *Revista de Direito do Consumidor*, São Paulo, vol. 44, p. 168-184, out./nov. 2002. p. 173.

<sup>44</sup> Art. 5 XXXII (Braz.).

<sup>45</sup> *Id.* art. 170 V.

<sup>46</sup> Varig S/A v. Jardim, RE No. 351750, Relator: Min. Marco Aurélio, 17.03.2009, R.J.S.P. 57-384/137.

<sup>47</sup> In 2012, this equaled approximately 1,600 euros. See, e.g., Eboli v. TAP Air Portugal, T.J.R.J., Ap. Civ. No. 0033664-97.2012.8.19.0001, Relator: Des. Andre Ribeiro, 25.10.2012. For other judgments of the same court, see Empresas Aéreas – Extravio, Violação E Furto De Bagagens, Banco do Conhecimento, [http://www.tjrj.jus.br/documents/10136/31308/responsabilidade\\_civil\\_empresas\\_aereas\\_extravio\\_violacao\\_furto\\_bagagens.pdf](http://www.tjrj.jus.br/documents/10136/31308/responsabilidade_civil_empresas_aereas_extravio_violacao_furto_bagagens.pdf).



are tremendously higher than the Conventions establish. According to Article 19 of the Montreal Convention establishes the higher limit at 4150 SDR (equivalent to R\$18.000). For instance, in a decision of the 6th Civil Court of Belo Horizonte, the court ordered the air carrier Gol to compensate R\$ 30.000 in moral damages to a passenger and her two children for negligent service offered by the company.<sup>48</sup> The judge took into account the upsets that the family suffered during a trip from Belo Horizonte to Lisbon in September 2006. According to the family, after many difficulties, they managed to travel to their destination, but on a different itinerary than the one contracted for. Besides the change in itinerary, the company only paid part of the altered tickets, meals, transport, and telephone expenses.

Looking at the figure, it seems that Brazilian courts are respecting the Convention, although not directly referring to it. However according to the Convention itself, Article 19 establishes that: "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." Since the conventions are silent regarding the measure of damages for delay, the matter is left to be decided by the competent court to which the case is referred to. The *lex fori* determines the conditions under which damage due to delay may be compensated.<sup>49</sup>

Divergent approaches have been taken. For instance, courts in the US interpret this Article as only related to material damages<sup>50</sup> while in the EU the Court of Justice of the European Union has established that the article could cover immaterial damages as well.<sup>51</sup> However, one common denominator is that within the 4150 SDRs everything should be included the new flights, the telephone expenses, etc. Rarely is moral damages granted unless the passengers demonstrate that the delay resulted in lost.<sup>52</sup> The consensus at international level is that consequential loss is compensated only when the passengers establish causality between delay and damage. Moral and psychological damages resulting from the delay are not compensable.<sup>53</sup> However, in Brazil, moral damages are the basis of compensation. More problematic, by only applying the CDC, Brazilian courts do overlook the second part of Article 19 of the Montreal Convention

<sup>48</sup> In 2006, this amount equaled approximately 12,000 euros. CAVALIERI FILHO, Sérgio. **Programa de Responsabilidade Civil** São Paulo: Atlas, 2010.

<sup>49</sup> MILLER, Georgette. **Liability in international air transport Deventer**. Alphen aan den Rijn: Kluwer Law International, 1977. p. 160.

<sup>50</sup> Campbell v. Air Jamaica Ltd., No. 11–CV–23233, 2012 WL3562126 (S.D. Fla. August 17, 2012); *Verdesca ex rel., v. American Airlines, Inc.*, 3:99–CV–2022–BD, 2000 WL 1538704, ( N.D. Texas Nov. 17, 2004)

<sup>51</sup> Case C-63/09, *Axel Walz v Clickair SA*, paragraph 29.

<sup>52</sup> GIEMULLA, Elmar; SCHMID, Ronald. **Montreal Convention Commentary**. The Hague: Kluwer Law International, 2006.

<sup>53</sup> For instance: *Barrett v United Airlines* No 92 C 5578 (ND, Ill, 1994 ) 1994, WL 419637

which lift the carriers liability and requires the carrier to “[...] proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures”, leaving airlines with few defences.

Indeed, unlike the Warsaw and the Montreal Convention, the CDC does not require any fault for the service provider to be held liable to the consumer, according to Article 14.<sup>54</sup> Exclusions of liability are embodied in the third paragraph of that article. The burden of proof is on the service provider invoking one of the exemptions, namely that the fault is solely due to the passenger or that there is no defect on the side of the service provider.<sup>55</sup> Surprisingly, the CDC does not refer to force majeure or Act of God, adopting a similar system as maritime or road conventions.<sup>56</sup> Articles 25<sup>57</sup> and 51<sup>58</sup> restrict greatly any limitation of liability that the carrier could try to invoke. This omission is in direct contradiction with the extraordinary circumstances provisions embodied in both the Warsaw and Montreal Conventions.<sup>59</sup> This omission renders the CDC stricter than the other systems.

On top of being stricter on the defenses available, Article 22 imposes a certain threshold on companies offering services to the public.<sup>60</sup> Additionally, if a company fails to meet the required standards, it is obliged to fully and integrally compensate the consumer for both material and immaterial damages.<sup>61</sup> Article 39 of the CDC prohibits any situation that leaves the consumer in excessive disadvantage. Therefore, if any alteration to a flight occurs before the check-in time, airlines are required to contact passengers by all possible means available, such as e-mail, telephone, and on-site contact. To avoid running afoul of Article 39, airline companies must seek confirmation that passengers have knowledge of the alteration. Article 39 put an obligation far beyond the obligations under the Conventions.

<sup>54</sup> *Id.* art. 14: “O fornecedor de serviços responde, independentemente da existência de culpa, pela reparação dos danos causados aos consumidores por defeitos relativos à prestação dos serviços, bem como por informações insuficientes e inadequadas sobre a fruição e risco.”

<sup>55</sup> *Id.* “I – que, tendo prestado o serviço, o defeito inexiste; ou II – a culpa é exclusiva do consumidor ou do terceiro.”

<sup>56</sup> The same exclusions exist in the CMR or in The Hague or Hague Visby Convention. All of these conventions deal with the carriage of goods.

<sup>57</sup> *Id.* art. 25: “É vedada a estipulação contratual de cláusula que impossibilite, exonere ou atenua a obrigação de indenizar prevista nesta e nas seções anteriores.”

<sup>58</sup> *Id.* art. 51: “São nulas de pleno direito, entre outras, as cláusulas contratuais relativas ao fornecimento de produtos e serviços que: I – impossibilitem, exonarem ou atenuem a responsabilidade do fornecedor por vícios de qualquer natureza dos produtos e serviços ou impliquem renúncia ou disposição de direitos. Nas relações de consumo entre o fornecedor e o consumidor-pessoa jurídica, a indenização poderá ser limitada, em situações justificáveis . . .”

<sup>59</sup> Warsaw Convention, art. 20; Montreal Convention, arts. 19 & 20.

<sup>60</sup> CDC, *supra* note 4, art. 22: “Os órgãos públicos, por si ou suas empresas, concessionárias, permissionárias ou sob qualquer outra forma de empreendimento, são obrigados a fornecer serviços adequados, eficientes, seguros e, quanto aos essenciais, contínuos.”

<sup>61</sup> *Id.* art. 6: “São direitos básicos do consumidor: . . . VI – a efetiva prevenção e reparação de danos patrimoniais e morais, individuais, coletivos e difusos.”

The relationship between the CDC and the Montreal Convention, with regard to consumer issues, is complicated and was discussed by the Federal Supreme Court in 2014.<sup>62</sup> Although Judges Gilmar Mendes, Luís Roberto Barroso, and Teori Zavascki favored the prevalence of Articles 17(2) and 19 of the Convention over the application of the CDC, nothing changed.<sup>63</sup> By using the Code instead of the Convention, the Brazilian courts ensure that their nationals are overly well protected. Indeed, the Brazilian Consumer Code offers extensive protection to consumers. At the same time, the Code gives Brazilian judges jurisdiction to hear any case involving a Brazilian consumer, even if all of the elements tend to favor another jurisdiction.<sup>64</sup> For instance, a Brazilian flying with Alitalia to Florence but due to a strike in Italy is blocked in Rome for a few hours can claim under the CDC according to Article 1, although all the elements scream Italy.

The argument is that the Brazilian Consumer Code is based on a Constitutional principle, and according to the Federal Supreme Court in *da Silveira Gois v. Leão Trindade*,<sup>65</sup> laws flowing from the Constitution have the capacity to override treaties and conventions with regard to consumer questions. The Court went further and stated that in the case of conflict, the *lei posteriori* prevails.<sup>66</sup> Accordingly, the Montreal Convention should prevail over the CDC, as it entered into force nearly 20 years after the CDC. However, in the rest of the judgment, and perhaps because it realized that air carrier liability would then be limited, the Tribunal went on and explained that laws deriving from the Constitution are supreme.

This type of reasoning cuts against the principle of the *lex specialis derogat lex generalis* embodied in Article 2(2) of the Law of Introduction to the Brazilian Civil Code.<sup>67</sup> Even though the CDC is considered as a specific law it was not enacted to regulate aviation issues specifically nor does it specifically refer to aviation.<sup>68</sup> The main argument for the use of the CDC rather than the Warsaw Convention, in cases involving flight delays or cancellations, was that the Warsaw Convention was appropriate for its time

<sup>62</sup> Joined cases S.T.F.-Recurso Extraordinário, RE No. 636331 e Recurso Extraordinário com Agravo ARE No. 766618, 08.05.2014. See Press Release, Federal Supreme Court, Suspended Judgment on Compensation Rule in International Air Transport, May 8, 2014, <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=266374>. In *Air Canada v. Giardulli*, ARE No. 766618-SP, Relator: Min. Roberto Barroso, 13.11.2013, a passenger who suffered a 12-hour delay on an international flight was granted R\$ 6000 for moral damages. This decision was contested by Air Canada, which argued that the parameters of the Montreal Convention should have applied.

<sup>63</sup> S.T.J.-ES, APL 00355503420138080024, Relator: Samuel Meira Brasil Junior, 26.4.2016. The decision against Alitalia was upheld on appeal, with the court stating that the CDC prevailed.

<sup>64</sup> CDC, art. 1.

<sup>65</sup> RE No. 80004-SE, Relator: Min. Xavier de Albuquerque, 29.12.1977, R.T.J. 83-3/809.

<sup>66</sup> CAVALIERI FILHO, Sérgio. **Programa de Responsabilidade Civil** São Paulo: Atlas, 2010. p. 320.

<sup>67</sup> Decreto-Lei No. 4.657, de 4 de Setembro de 1942, Lei de Introdução às normas do Direito Brasileiro. The previous name was Lei de Introdução ao Código Civil Brasileiro.

<sup>68</sup> "Ressalta-se, ainda, que o Código de Defesa do Consumidor (Lei No. 8.078/90) é norma especial de ordem pública, de caráter cogente e de observância obrigatória, aplicando-se integralmente a toda relação de consumo." Translation: "[i]t results that the CDC is a specific law that has the force of public order and therefore which is mandatory to obey. The law is entirely and totally applicable to all consumer relationships." See Circular No. 5762-2012, *supra* note 5.

but did not fit modern reality. The objective of the Convention was predominantly economic, which was fundamental for the development of civil aviation, while the objective of the CDC is the protection of consumers. Therefore, the two instruments had different objectives, leading to the CDC being considered more appropriate to regulate cases involving consumers. Indeed, the social function carried out by consumption relationships introduced by the CDC is important to be examined in conjunction with other legislative instruments.<sup>69</sup> The argument was that the Brazilian Consumer Code had been enacted after Código Brasileiro do Ar and, therefore, relying on the principle that newer law derogates older law, judges applied the Brazilian Consumer Code.<sup>70</sup> However, such an argument is not viable with regard to the much newer Montreal Convention. Indeed, the Montreal Convention entered into force after the CDC and is a more specific law. Still, the Brazilian judiciary takes a constitutional approach resulting in the prevalence of the CDC.<sup>71</sup>

Having looked at all the above reasons, it can be easily concluded that the constitutional argument used to set aside international conventions and apply the Consumer Code is imaginative. This approach is also based on the theory followed by the country with regard to international law. Indeed, international law does not determine which theory, monism or dualism, is to be preferred; the only requirement is that international law is respected. Consequently, it is left to every State to decide which is the most suitable, according to its legal traditions. It is not the role of international law to determine this aspect of legal enforcement.<sup>72</sup>

The major problem of the Brazilian approach – putting aside that it disregards two principles of international law, namely *lex posterior derogat legi anteriori* and *lex specialis derogat lex generalis* – is that it neglects the principle of reciprocity and legal certainty. Indeed, the nature of the airlines' activities is *per se* risky. The Warsaw and Montreal Conventions instituted a system whereby companies are made aware of the amount of compensation that a failure to safely carry passengers or their baggage will be required from them, leading to legal certainty. The European regulation<sup>73</sup> follows the same principle, even though, as explained *supra*, in the case of the EU it is rather the passengers that are left without the certainty of being compensated.<sup>74</sup> More

<sup>69</sup> PINHO, Rodrigo C. Rebello. **O Transporte Aéreo e o Código de Defesa do Consumidor**. Available at: <[http://www.mpsp.mp.br/portal/page/portal/cao\\_consumidor/doutrinas/VARIG%20Consumidor](http://www.mpsp.mp.br/portal/page/portal/cao_consumidor/doutrinas/VARIG%20Consumidor)>.

<sup>70</sup> FARES, Ali Taleb. Novo Panorama da Responsabilidade Civil no Transporte Aéreo. **Revista Brasileira de Direito Aeronáutico**, Rio de Janeiro, n. 97, sept. 2016. Available: <<http://www.sbda.org.br/revista/Anterior/1731.htm>>.

<sup>71</sup> S.T.J.-Recurso Especial, AgRg. No. AREsp 388975 MA 2013/0289400-6, Relator: Min. Marco Buzzi, 17.10.2013.

<sup>72</sup> CASSESE, Antonio. **International Law in a Divided World**. Oxford: Oxford University Press, 1986. p. 21–22.

<sup>73</sup> Regulation (EC) No. 261/2004 of the European Parliament and of the Council, Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No. 295/91, 2004 O.J. (L 46) 1.

<sup>74</sup> Fewer than one percent of the passengers eligible for compensation are indeed compensated. See *Know Your Rights*, AirHelp, <https://www.getairhelp.com/en/know-your-rights> (last visited 20 November, 2016).

importantly, the principle of reciprocity is stepped upon by Brazilian courts, in violation of Article 178 of the Constitution. Indeed, Iberia Airlines in Brazil has no clue of the amount of compensation it can be ordered to pay, while TAM in Spain knows exactly the maximum amount that it could be required to compensate. This has created a disturbing imbalance on the international level, disadvantaging major airline companies operating in Brazil. Brazil prefers to adopt a position of overprotecting social welfare rather than following the principle of reciprocity.<sup>75</sup>

Finally, Brazil's approach conflicts with Article 27 of the Vienna Convention on the Law of Treaties,<sup>76</sup> which states that a Contracting State cannot invoke national law as justification to avoid the application of provisions of an international treaty. The only exception allowed by Article 27 does not apply in this case. Brazil acceded not long ago to this Convention,<sup>77</sup> well after the CDC entered into force. The Vienna Convention renders null and void the argument that the CDC is a superior law and international treaties are merely normal law.

## 7. CONCLUSION

Most constitutions specify that treaties ratified by the State are part of domestic law without the need for further action from the State.<sup>78</sup> Under both monist and dualist theory, the determination of whether actions are legal or not is based on both national rules and international norms.<sup>79</sup> International law still remains supreme, even in dualist systems. States cannot explain the non-fulfilment of their international obligations by relying on national law,<sup>80</sup> although national laws that contradict international law remain in force. The derogation of international obligations on the basis of national law is contrary to Article 27 of the Vienna Convention on the Law of Treaties.<sup>81</sup> Indeed, if every State could avoid its international obligations on basis of national law, then there would be no purpose in enacting treaties which are there to harmonise the system previously existent.

<sup>75</sup> See *Varig S/A v. Jardim*, RE No. 351750 (holding that "[a]fastam-se as normas especiais do Código Brasileiro da Aeronáutica e da Convenção de Varsóvia quando implicarem retrocesso social ou vilipêndio aos direitos assegurados pelo Código de Defesa do Consumidor." Translation: "[t]he specific provisions of the Código Brasileiro da Aeronáutica and the Warsaw Convention should be disregarded when the application of such provisions imply social retrocession or dishonor of the rights guaranteed by the Consumer Code.").

<sup>76</sup> Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331.

<sup>77</sup> Legislative Decree 583/2012.

<sup>78</sup> FELDMAN, David. Monism. Dualism and Constitutional Legitimacy. *Australian Year Book of International Law*, Sydney, vol. 20, 1999. p.105.

<sup>79</sup> KOOIJMANS, P. *Internationaal Publiekrecht in Vogelvlucht*. Winschoterdiep: Wolters-Noordhoff, 1994. p. 82.

<sup>80</sup> LAUTERPACHT, H. *The Development of International Law by International Court*. Cambridge: Cambridge University Press, 1982. p. 262.

<sup>81</sup> Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331, <http://www.worldtradelaw.net/misc/vienna-convention.pdf>.

When the monist theory is followed in its purest form, States are not required to translate international law into national law in order for the international law to be applicable. In addition to being directly applicable, international law is given primacy under the purest form of the monist theory.<sup>82</sup> The international law will be incorporated and automatically effective just by the simple act of ratification. The U.S. system, which is not a purely monist system, but rather a mixture of both monist and dualist systems, in Article VI of the U.S. Constitution elevates treaties as part of the Supreme Law of the Land.

Then we have Brazil, which has proclaimed itself “moderate monist.” Alfred Verdross developed the moderate monist theory; however, in his conception, international law is primary.<sup>83</sup> Nonetheless, as has been demonstrated, the position of Brazil’s Supreme Federal Court in respect to the Consumer Code runs counter to the principle of primacy of international law.

While the Brazilian Constitution elevates consumer protection to a constitutional right, protecting a value through a higher norm, the Supreme Federal Court elevated the status of the Consumer Code to that of a superior law, exceeding the original status given to the protection of consumers and giving to a value the importance of a norm. By doing that, the Supreme Federal Court has confused values, the protection of consumers, with international obligations, the norm, and achieved the wrong balance.

Although it has been argued that the inclusion of fundamental consumer rights in national constitutions would raise the standard of living, such inclusion has a negative effect on the market that might be unable to sustain the changes in economic and financial circumstances.<sup>84</sup> Centuries ago, Plato already warned the danger that could arise if norms are not differentiated from values or conventions. Norms protect values but the two are different and should not be confused.<sup>85</sup> The norms enacted in the Constitution should not be mixed with values, in this case the protection of the consumer. Including consumer rights in the Constitution makes it hard for the market to then evolve to fit the new realities it is facing, even though economic welfare is important and is partly related to consumer welfare.<sup>86</sup> Such position is exemplified by use of the CDC instead of the Montreal Convention in Brazil, leading to legal uncertainty for airline companies and pricier tickets for consumers. It also seems that the Brazilian

<sup>82</sup> AUST, Antony, *Modern Treaty Law and Practice*. 2<sup>nd</sup> ed, Cambridge University Press, 2007, p.183–87

<sup>83</sup> VERDROSS, Alfred. *Die Einheit Des Rechtlichen Weltbildes auf der Grundlage der Völkerrechtsverfassung*. Tübingen: Mohr, 1923.

<sup>84</sup> BENOHR, I.; MICKLITZ, Hans. Consumer protection and human rights. In: HOWELLS, I.; RAMSAY, T. (Ed.). *Handbook of Research on International Consumer Law*. Cheltenham: Edward Elgar Publishing, 2010. p. 25.

<sup>85</sup> MARBACK, Richard. *Plato’s Dream of Sophistry* 1999).

<sup>86</sup> PETERSMANN, E. U. Taking human dignity, poverty and empowerment of individuals more seriously: Rejoinder to Alston. *European Journal of Constitutional Law*, Firenze, vol. 13, n. 4, 2002. p. 849.

Federal Court itself has confused values with international obligations, endangering the principle of reciprocity in favour of consumer protection.

The Brazilian legislature and judiciary went above and beyond to protect consumers and follow the unenumerated rights approach. Unenumerated rights are natural rights. Natural rights are legal rights inferred from other legal rights that are embodied in codified law but are not expressly enumerated in that law.<sup>87</sup> Unenumerated rights are important insofar as the positively enumerated rights could not be maintained without them.<sup>88</sup> Indeed, the Brazilian Constitution refers three times to consumer protection in a more abstract way. However, the Brazilian judiciary has interpreted, relying on the pure theory of law, these broad articles as requiring special laws to be enacted, and granting such special laws the status of superior law, which is reinforced by Article 1 of the CDC.

Granting consumer protection a constitutional status is dangerous as it might end up in a similar situation as in Brazil whereby the principle of reciprocity with regard to international treaties is not respected, leading to legal uncertainty. Moreover, the reasoning on which the prevalence of the CDC is based, namely that the CDC is flowing from Article 5 of the Brazilian Constitution and therefore is a superior law, violates the principle of the *lex specialis derogat lex generalis* embodied in Article 2(2) of the Law of Introduction to the Civil Code. The main argument for the use of the CDC rather than the Warsaw Convention is that the Convention was appropriate for its time but does not fit modern reality. The objective of that Convention was predominantly economic, which was fundamental for the development of civil aviation, while the objective of the CDC is consumer protection. Therefore, the two instruments have different objectives, leading to the CDC being more appropriate to govern cases involving consumers. Indeed, the social function carried out by consumption relationships introduced by the CDC is important to be examined in conjunction with other legislative instruments.

For aviation at least, Constitutions with heavy consumer rights render the countries less competitive as the burden on the companies are extremely high.

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